



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

'JUL 20 2009

VIA CERTIFIED MAIL

Mr. James Bopp, Jr., Esq.
Mr. Barry A. Bostrom, Esq.
Bopp, Colson & Bostrom
The National Building
One South Sixth Street
Terre Haute, Indiana 47807-3510

RE: MUR 6133
National Right to Life PAC and
Carol Tobias, in her official capacity as
treasurer

Dear Messrs. Bopp and Bostrom:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, on April 6, 2006, the Federal Election Commission ("the Commission") found reason to believe that National Right to Life Political Action Committee and Carol Tobias, in her official capacity as treasurer, violated 2 U.S.C. § 434(g).

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation of 2 U.S.C. § 434(g) has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible. The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. All extensions will be subject to a tolling agreement.

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You may also request an oral hearing before the Commission. See "Procedural Rules for Probable Cause Hearings," 72 Fed. Reg. 64919 (Nov. 19, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Roy Q. Luckett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Thomasenia P. Duncan
General Counsel

Enclosure
Brief

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JUL 20 2009

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

National Right to Life Political Action Committee
and Carol Tobias, in her official capacity as treasurer

MUR 6133

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was generated based on an audit referral. On November 18, 2008, the Federal Election Commission ("Commission") found reason to believe that the National Right to Life Political Action Committee and Carol Tobias, in her official capacity as treasurer ("the Committee" or "Respondents"), violated 2 U.S.C. § 434(g), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to file or untimely filing 24- or 48-Hour Notices for at least one hundred and thirty independent expenditures during the 2004 election cycle, involving a total aggregate amount of \$1,660,708. Based on the following factual and legal analysis, we are prepared to recommend that the Commission find probable cause to believe that the Committee violated 2 U.S.C. § 434(g).

II. STATEMENT OF FACTS

For both 24- and 48-Hour Notices of Independent Expenditures, the date that a communication is publicly disseminated or distributed serves as the date a committee must use to determine if the total amount of independent expenditures, in the aggregate, has reached or exceeded the threshold for reporting. 11 C.F.R. §§ 104.4(f) and 104.5(g)(2).

During the 2004 election cycle, the Committee made 1,545 independent expenditures totaling \$3,718,909. These expenditures include 71 independent expenditures—totaling

1 \$176,721—that were made during the period January 1, 2003 through September 30, 2004, and
2 1,474 independent expenditures—totaling \$3,542,188—that were made after October 1, 2004.
3 With respect to the independent expenditures made during the period January 1, 2003 through
4 September 30, 2004, the Committee failed to file or timely file 24- or 48-Hour Notices for 42 of
5 them, totaling \$110,168. As for the remaining 1,474 independent expenditures totaling
6 \$3,542,188, the Committee failed to file or timely file 24 or 48-Hour Notices for at least 88 of
7 them, totaling \$1,551,540.94. In discussions with the Audit Division, the Committee conceded
8 during the exit conference that it itemized all independent expenditures and filed 24- and 48-
9 Hour Notices based on the date of the check to the vendor, rather than based on the
10 dissemination or distribution date. Moreover, for the majority of the expenditures, the
11 Committee failed to maintain dissemination/distribution date documentation of the
12 communications. In each instance where the Committee was able to ascertain the dissemination
13 or distribution date, 24- or 48-Hour Notices were untimely filed.

14 The Committee admits that it violated the Act by failing to file timely independent
15 expenditure notices. It attributes the violation to its treasurer's misconception that the trigger
16 date for reporting was the date of payment for the communication constituting the independent
17 expenditure rather than 24- or 48-hours after the communication is first publicly disseminated or
18 distributed. Committee January 24, 2009, Response at 3. According to the Committee, the only
19 mistake that the treasurer made was "misunderstanding when 24- and 48-hour reports were due,"
20 and she unfortunately repeated the one mistake "many times over." *Id.* 4. Moreover, the
21 Committee contends that the treasurer's misconception was understandable because of the lack
22 of clear guidance for "laity" on when independent expenditure reports must be filed with the
23 Commission. *Id.* at 15.

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III. LEGAL ANALYSIS

The law with respect to when independent expenditures are made and subject to the notice filing requirements is quite clear; the information that the reporting obligation is linked to the date of distribution or dissemination is repeated several times. The Act provides that the Commission must receive a political committee's reports of independent expenditures within 24 or 48 hours, whichever is applicable, of the date that the independent expenditure is publicly distributed or otherwise disseminated. 2 U.S.C. § 434(g). Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made.

2 U.S.C. § 434(g)(1)(A). A 24-Hour Notice is required for each additional \$1,000 that aggregates. 2 U.S.C. § 434(g)(1)(B). Any independent expenditure aggregating \$10,000 or more with respect to any given election, at any time during a calendar year, up to and including the 20th day before an election, must be disclosed within 48 hours each time that the expenditures aggregate \$10,000 or more. 2 U.S.C. § 434(g)(2).

Additionally, the Commission's post-BCRA regulations at 11 C.F.R. §§ 104.4 and 109.10 state that political committees or other persons must ensure that the Commission receives independent expenditure reports by 11:59 p.m. Eastern Standard Daylight Time on the second day (for 48-Hour Notices) or the next day (for 24-Hour Notices) "following the date on which the communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. §§ 104.4(b), (c) and 109.10(c) and (d). The same applies for each subsequent independent expenditure aggregating above either the \$1,000 (for 24 Hour Notices) or \$10,000 (for 48 Hour Notices) threshold. *Id.* The aggregation calculation time

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1 is additionally specified to be "as of the first date on which a communication that constitutes an
2 independent expenditure is publicly distributed or otherwise publicly disseminated, and of the
3 date that any such communication with respect to the same election is subsequently publicly
4 distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(f). These regulations
5 became effective on February 3, 2003.

6 Prior to the regulations becoming effective, the Commission provided clear guidance to
7 the regulated community regarding the regulations' requirements. Specifically, the *Record's*
8 January 2003 edition described them. As to 48-Hour and 24-Hour independent expenditure
9 reporting, the *Record* stated that the reports must be received by the Commission by the end of
10 the second day or the end of the day, respectively, following the date that the independent
11 expenditure is publicly distributed or disseminated. January 2003 *Record* at 14-15. *See also*
12 "BCRA Campaign Guide Supplement" (January 2003) at 20; Instructions FEC Form 3x,
13 Schedule E, Itemized Indep. Expenditures (Feb. 2003) at 19. Moreover, in discussions with the
14 Audit Division, the Committee's treasurer acknowledged during the exit conference that she and
15 other Committee staff attended a Commission-sponsored seminar in 2003 providing guidance of
16 when independent expenditures should be reported. In light of these facts, the Committee's
17 argument that it failed to file independent expenditure notices properly because the guidance was
18 unclear lacks factual support.

19 Notwithstanding the clarity of the requirements in the Act, the Commission's regulations,
20 and other guidance, Respondents assert that the "laity" would focus on the word "expenditure"
21 in the guidance and conclude that the reporting requirement for independent expenditures turns
22 on the "payment" date, rather than the distribution or dissemination date, of the communication.
23 Committee Response at 6, 8. In fact, however, in a pre-BCRA rulemaking involving the

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1 reporting of independent expenditures, the only comment indicated that the general
2 understanding was that an independent expenditure was made on the date of distribution or
3 dissemination. The Commission had sought comment in its May 9, 2001 Notice of Proposed
4 Rulemaking ("NPRM") on the following three-pronged definition of when an independent
5 expenditure is made: an independent expenditure is made at the earliest of: (1) the date on which
6 a written contract, promise, or agreement to make an independent expenditure is executed;
7 (2) the first date on which the communication is printed, broadcast, or otherwise publicly
8 disseminated; or (3) the date on which the person making the expenditure pays for it. *See*
9 NPRM, 66 Fed. Reg. 23628, 23632 (May 9, 2001).

10 The Explanation and Justification for the final rule notes that the Commission received
11 only one comment on the NPRM. 67 Fed. Reg. 12834, 12837 (March 20, 2002). That comment
12 stated that only the second option was viable because "organizations reporting independent
13 expenditures have always understood an 'independent expenditure' to be 'made' when the
14 communication is released to the public." Comment dated June 8, 2001 at 3. The comment also
15 pointed out that "[b]ecause an 'independent expenditure' requires both an expenditure and an
16 express advocacy communication, it does not even come into existence until the communication
17 occurs." *Id.* at 5. Further, the comment objected to the word "printed" in the second prong,
18 which the Commission decided to change to the word "published" in the final rules "to remove
19 any confusion as to when a communication for an independent expenditure is made." *Id.* The
20 final rules at pre-BCRA section 109.1(f), effective June 13, 2002, exclusively defined when an
21 independent expenditure is made as "the first date on which the communication is published,
22 broadcast, or otherwise publicly disseminated." This definitional concept of when an
23 independent expenditure is made thus predated the 2004 election cycle by approximately five

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1 months, and has been in place ever since, as reflected in sections 104 and 109 of the
2 Commission's regulations. *See* pre-BCRA effective June 13, 2002, 11 C.F.R. § 109.1(f) and
3 post-BCRA effective February 3, 2003, 11 C.F.R. §§ 104.4 and 109.10. *See also* May 2002
4 *Record* at 2.

5 While the available guidance for reporting independent expenditures is clear even to the
6 "laity," it does not appear that the treasurer of the National Right to Life PAC during the 2004
7 election cycle belongs in this category, as she was a highly experienced treasurer. According to
8 available sources, she had served as the PAC's treasurer since July 31, 1991. The Commission
9 has recognized that "[t]he Act designates treasurers to play a unique role in a political
10 committee; a treasurer is the only office a political committee is required to fill.
11 2 U.S.C. § 432(a)." Further, "[w]ithout a treasurer, committees cannot undertake the host of
12 activities necessary to carry out their mission, including receiving and disbursing funds and
13 publicly disclosing" the committee's finances, and can even, under certain circumstances, be
14 held personally liable for failing to fulfill their obligations under the Act and the Commission's
15 regulations. Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings,
16 70 Fed. Reg. 3, 5 (January 3, 2005). Thus, treasurers, in general, should be expected to
17 understand the applicable reporting requirements at a level exceeding that of an average
18 layperson. In the case of the Committee, in particular, which spent nearly four million dollars on
19 independent expenditures during the 2004 election cycle, it is particularly critical that the
20 treasurer obtain full and accurate knowledge of the reporting rules for such expenditures.

21 Moreover, because the guidance was so clear, treasurers have an obligation to know the
22 reporting requirements, and the Committee's treasurer should have been especially well-versed
23 in the law applicable to reporting independent expenditures, the claim of "one mistake" made

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1 "many times over"—at least 130 times to be exact—should not be cause for leniency. Each time
2 the notification was not timely made, the public was left without information to which it was
3 entitled, and cumulatively was timely bereft of information concerning \$1,660,708 in
4 independent expenditures by the Committee. The amount of the harm to the public is linked to
5 the seriousness of the violation in this matter. *See FEC v. Furgatch*, 869 F.2d 1256, 1259 (9th
6 Cir. 1989). The harm to the public here is not trivial, but quite substantial, as each untimely filed
7 notice failed to keep the public informed of independent expenditures that were made. Indeed, a
8 significant amount of the Committee's independent expenditures were not reported until after the
9 2004 general election. The error is, in fact, compounded, because the Committee failed, in most
10 cases, to keep records of the dissemination dates, so that the public record can not be corrected
11 even now.

12 In conclusion, the Committee was required during the 2004 election cycle to file Notices
13 of Independent Expenditures for at least 130 independent expenditures totaling \$1,660,708 such
14 that the Commission received the notices no later than 24 or 48 hours after the dates of
15 dissemination, whichever was applicable. Because it admittedly failed to do so, the Committee
16 violated 2 U.S.C. § 434(g). Accordingly, we are prepared to recommend that the Commission
17 find probable cause to believe that National Right to Life Political Action Committee and Carol
18 Tobias, in her official capacity as treasurer, violated 2 U.S.C. § 434(g).

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IV. GENERAL COUNSEL'S RECOMMENDATION

- I. Find probable cause to believe that National Right to Life Political Action Committee and Carol Tobias, in her official capacity as treasurer, violated 2 U.S.C. § 434(g).

July 17, 2009
Date

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